

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY DEMETRIS IRBY,
Plaintiff,
v.
NARANJO, *et al.*,
Defendants.

Case No. 2:21-cv-01039-KJM-JDP (PC)
FINDINGS AND RECOMMENDATIONS
THAT THIS ACTION BE DISMISSED
WITHOUT PREJUDICE FOR FAILURE TO
PROSECUTE

Plaintiff, a county inmate proceeding without counsel, commenced this civil rights action under 42 U.S.C. § 1983. On December 3, 2021, I screened plaintiff's complaint pursuant to U.S.C. § 1915A. ECF No. 10. I notified plaintiff that he could proceed with his viable due process claim against defendant Naranjo, but that his remaining claims were not cognizable. *Id.* at 3-4. I therefore ordered plaintiff, within thirty days, either to file an amended complaint or notify the court that he wishes to proceed only with his claim. To date, plaintiff has not complied with that order.¹

¹ On December 27, 2021, the Solano County Sheriff's Office filed a notice stating that the "Plaintiff is confirmed deceased with our Coroner's Office." ECF No. 12. Although Federal Rule of Civil Procedure 25 permits a decedent's successor or representative to file a motion for substitution—which must be filed within ninety days of service of a statement noting the death—adherence to Rule 25's procedure is not feasible in this case. To trigger the ninety-day period for filing a motion for substitution, the suggestion of death must be served upon a non-party successor or representative of the deceased party in accordance with Rule 4. *Barlow v. Ground,*

1 Accordingly, it is RECOMMENDED that this action be dismissed without prejudice for
2 failure to prosecute. Fed. R. Civ. P. 41(b); E.D. Cal. Local Rule 110.

3 I submit these findings and recommendations to the district judge under 28 U.S.C.
4 § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
5 Eastern District of California. Within 14 days of the service of the findings and
6 recommendations, any party may file written objections to the findings and recommendations
7 with the court and serve a copy on all parties. That document should be captioned “Objections to
8 Magistrate Judge’s Findings and Recommendations.” The district judge will review the findings
9 and recommendations under 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the
10 specified time may result in the waiver of rights on appeal. *See Wilkerson v. Wheeler*, 772 F.3d
11 834, 839 (9th Cir. 2014).

12 IT IS SO ORDERED.

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14 Dated: January 25, 2022


15 JEREMY D. PETERSON
16 UNITED STATES MAGISTRATE JUDGE

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25 39 F.3d 231, 233 (9th Cir. 1994). The burden of serving successors or representatives is placed
26 on the “suggesting party.” *Id.* at 233. Although the Solano County Sheriff’s Office—the entity
27 that provided notice of plaintiff’s death—is named as a defendant in this case, it has not been
28 served or formally appeared in this action. There are also no other parties who could effectuate
service of a statement noting death. Consequently, I find that dismissal without prejudice for
failure to prosecute is appropriate in this case.